

Political History of Muslim Law in Indo-Pak Sub-Continent

**By
Justice Shahzado Shaikh**

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ISBN – 978-969-9784-02-6

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First Edition: 2012
Published by: Prof. S.M. Yusuf
Printed by: Sindhica Academy, Karachi
Phone: 021-32737290

Price: 50/=

Mission Unto Light International
P.O. Box-7, Larkana; Phone: 0300-3413049

www.islamicbooks.com.pk

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“Islamisation of laws has also had unexpectedly positive effects with respect to the rule of law. After all, while the judicial authorities were grappling with the issue of Islamisation, another conflict continuously simmered in the background, one of no less importance to the judges:

The battle against authoritarian government leaders and for the judiciary’s own independence, for the rule of law, and for democracy. In this struggle existing legislation did not offer the judges much help because laws were under the control of the government and the government-dominated parliament. So, judges often called upon fundamental legal principles and began using Islamic concepts such as ‘Islamic justice’ and ‘public interest’ (Lau 2003). As is the case in India, a series of ‘public interest’ cases has also arisen in Pakistan. Unlike the secular system of India, however, this progressive development in Pakistan owes much to liberal interpretations of the sharia.” [Martin Lau, Sharia and National Law in Pakistan, (Sharia Incorporated, edited by Jan Michiel Otto, pp.424-425)]

Acknowledgement And Dedication

Mr Shamshadullah Cheema, Principal, Rawalpindi Law College, Rawalpindi, a renowned senior advocate and a gem of a friend, was very kind to me personally, to provide me an opportunity of teaching Islamic Jurisprudence and Muslim Personal Law, to LL.B. I & II Classes, at his College. I have arranged some material from the notes, I had prepared for my lectures, into following books, for publication:

- *Shariat and its Structural Basis,*
- *Political History of Muslim Law in Indo-Pak Sub-Continent,*
- *Juris-diction of Shariah and Jurisdiction of Shariat Court,*
- *Modern Challenges to Development of Muslim Law - Genesis and Germination,*
- *Understanding Classical Approaches and Modern Challenges to Muslim Law.*

I am thankful to Mr Shamshadullah Cheema for providing me this opportunity. I am also grateful to Professor Muhammad Yusuf Shaikh, Principal, Cadet College, Larkana, for his continued encouragement and support for my humble work, and his personal efforts for its quality and publication.

I dedicate these very small compilations to the students of Rawalpindi Law College, Rawalpindi, whose loving participation pressed me for better preparation and import into this modest endeavour.

Justice Shahzado Shaikh
Islamabad
16.4.2012

Publisher's Note

It Justice Shahzado Shaikh, Judge Federal Shariat Court Islamabad, who has at his credit a series of internationally acclaimed books, including 'Know Your God', 'Gateway to the Quran', 'Pure Truth – Al-Ikhlās' and others books has, through this book, traced the political history of Muslim law in Indo-Pak sub continent with an scholastic approach and vast research in the field.

It is, therefore, a matter of pride for the Mission to bring forth his untiring efforts in form of handy book for the enlightenment of our readers.

It is hoped this book will open new vistas for the teachers and the taught who are keen to further increase their knowledge about the consistent evolution of Muslim Law.

Mission Unto Light International
P.O Box 7, Larkana (Sindh) Pakistan
26 July 2012

Prof. Muhammad Yusuf
Chief Executive

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Political History of Muslim Law In Indo-Pak Sub-Continent

In order to understand the current legal frame, it is important to study the history of its laws..

Melting pot, although fractured, of Indian sub-continent, slotted diverse South Asian history, civilizations and cultures in its laws and legal traditions. Reformed Hinduism assimilated and outlived immense impact of Buddhism and Jainism in fifth century BC. Muslim traders developed contacts along West Indian Malabar coast in early seventh century CE. Sovereign presence of Muslims came to be established with conquest of Sindh. Buddhist and Hindu communities were largely allowed to follow their own law in civil matters. In tenth century Mahmood of Ghazni subjugated Punjab to his empire. Muhammad of Ghur, paved way for formation of Delhi Sultanate in twelfth century. Emergence of Muslim dynasties in the North came to establish Mughal empire in sixteenth century.

Mughal rulers applied Hindu and Islamic laws to their subjects conformably with their own views, to safeguard and guarantee to each of these communities the practice of its own religion. During Mughal Rule, **Qazis administered law,**

Political History of Muslim Law in Indo-Pak Sub-Continent

as the law of the land. Mughal administrative structures were adopted by East India Company. The Company had been granted exclusive right to conduct business with and in India by British Crown in successive Charters, since 1600. The Company, gradually brought Mughal power to end in 1857. The Company's system came to end in 1858 when areas controlled by it came under the Crown. Influence of **English Common Law** and **Principles of Equity**, increased with time. By beginning of nineteenth century, EIC controlled about two thirds of India.

Colonial legal system emerged through interaction with indigenous laws and cultures, in a spectrum of centralized system of Mughal empire, kingdoms of Hindus and Sikhs, small princely states, and self-governing communities in mountains, deserts and forests. Economies were mainly agricultural, under diverse systems of land tenures and holdings, yielding tax revenues. Production of goods and trade kept cities busy in seventeenth century, at par with many of those in European countries.

Religion played important role in Indian diverse legal traditions and social order. Local forms of dispute resolution were also customary, strengthened by religious elements and tribal allegiance. During Muslim rule, and as continued by the British, disputes among Hindus were normally settled by Brahmin judges, and those between Hindus and Muslims by *Qazis* under Shariah law, and sometimes by officials under customary law. Shariah was applicable in matters of criminal law, except, where non-Muslims were exempted. Consistency and severity of its application varied from time to time, and locality to locality.

British policy may be traced to Charter of George II, granted in 1753. Warren Hastings's Plan, adopted in 1772, when East India Company took over management of territories, permitted application of *Shariah* in matters of

personal laws. Regulation II of 1772 provided that 'in all suits regarding inheritance, succession, marriage and caste and other usages or institutions, the laws of the Koran with respect to '*Mahomedans*', and those of *Shaster* with respect to *Gentoos* (Hindus), shall be invariably adhered to'. *Maulvis* were to attend courts to expound law and assist in administration of justice. Where personal laws of parties differed, law of defendant was applicable.

It was for judge to determine applicable law of school or sub-school. General principle was that **it is highly undesirable 'to introduce purposeless distinctions between the law applicable, in the case of one community, and that applicable in the case of another'**.

Terms 'Sunni' law and 'Shia' law, were used, mainly, for Hanafi opinion and Ithna Ashari opinion, respectively.

Thus general position regarding **applicability of Muslim law**, over a period of time, could be summarized:

- (i) Where both parties to suit were Muslims and followed same legal opinion, Muslim law of that system applied,
- (ii) Where parties to suit differed in religion or did not belong to same opinion or system of Muslim law, defendant's applied, e.g., husband following Ashari opinion sues his wife, who follows Hanafi opinion for restitution of conjugal rights; the wife is entitled to benefit of defence valid in Hanafi legal opinion or system of law.
- (iii) Where person in good faith changed his religion, or his legal opinion in Islam, ordinarily personal law changed *with immediate effect* from time of such conversion, e.g., if Hindu embraces Islam, Muslim law will apply from date of such conversion.
- (iv) Where person who is convert to new faith, or has changed his school of law in Islam, dies, law of

succession applicable to estate will be law of religion or legal opinion which he professed at the time of his death, e.g., Muslim is converted to Christianity before his death. Indian Succession Act, 1925, will apply. If person who follows Hanafi legal opinion adopts Ithna Ashari legal opinion, then dies. Ithna Ashari legal opinion will apply.

In 1726, *Mayors' courts* of British Crown, not of the Company, had been set up in **Madras, Bombay and Calcutta**,. By implication, law of England was to be applied. Under Charter of George II, granted in 1753, these courts were precluded, from trying cases between Indians except by consent of both parties, as per existing practice. **Muslim personal law was applied to Muslims, as a matter of policy**, inherited from Mughals. An early comment on this view is to be found in a letter written by Sir William Jones, the Calcutta judge and orientalist in 1788.

Up till 1765 responsibility of **East India Company** for administration of law was confined to three **Presidency Towns of Madras, Bombay and Calcutta**, where its factories had been established. Outside Presidency towns and in **Bengal**, in 1765, Clive received the grant of '**Diwan**' (**fiscal administration and civil jurisdiction**) from puppet Moghul '*Emperor*' in Delhi. At the same time, the Company also usurped **Nizamat (criminal jurisdiction)**, at first, through indirect control.

The Way India Was Conquered and Political Power Consolidated: Impact On Legal Traditions:

- EIC started as a trading company,
- Established trading posts (so-called 'factories'), along coastline.

- EIC Charter of 1600 allowed it to *make and administer laws in its 'territories'*,
- Local laws and cultures, outside presidency towns of Madras, Bombay and Calcutta, were recognized.
- EIC established political control over increasing parts of India, but it lacked means to impose its own legal system..
- Colonial legal system emerged piecemeal, with economic and political concerns.
- EIC collected revenue.
- **Administration of justice, civil and criminal, remained under Muslim law.**
- **Law officers were mostly Muslims.**
- **Crimes were tried under Muslim law.**
- **In civil matters, Muslim law was applied to Muslims** in accordance with opinion of *maulvis* (religious scholars), attached to courts.
- Courts had to interpret law and were not bound by opinion of experts.
- By 1864, availability of case-law and textbooks was considered sufficient to be able to dispense with services of indigenous experts of religious law. Since then judges themselves determined, interpreted and applied religion based system of personal laws.
- By middle of nineteenth century, colonial legal system, was marked by:
 - -being built on hierarchy of colonial, modern courts, whose judgements were enforced by powerful state,
 - -incorporating two sets of laws:
 - o religiously based family laws, and

- o uniform civil and criminal laws, and
- -reformist posture within framework of a holding company to maintain order and peace.
- -reformist stance of colonialists was cautious with some practices, e.g., *sati* and child marriage, although outlawed. [*Sati* (Sanskrit): practice of Hindu widow to burn herself on funeral pyre of her dead husband. It was outlawed in 1929]. (Sati Abolition Act, 1929)
- Reluctance to interfere with religious beliefs of indigenous population, was re-enforced by uprising of 1857, which was preceded by Christian missionary zeal in EIC's policies:
 - -Eighteenth century indicates unashamed lust for profit. Influence of *Evangelical movement in Britain in first decades of nineteenth century* was felt on EIC in India.
 - -Policy of non-interference with indigenous religions softened and *ban on Christian missionaries working in India was lifted in 1813.*
 - -*Laws were enacted to promote conversions*, such as the *Caste Disabilities Removal Act 1850*, which *preserved rights of inheritance under personal law that a convert held prior to conversion.*
 - -Campaigns against 'barbaric' practices, e.g., female infanticide, were pursued.
- The 1857 uprising, triggered by refusal of Indian soldiers to bite off ends of newly introduced cartridges, treated with animal fat, was interpreted as reaction against a British plan to Christianise India.
- End of the 1857 uprising spelt:

- end of Mughal empire, and also
- end of EIC rule:
 - o in 1858 India became 'crown colony'.
 - o in order to prevent another 'mutiny', Queen Victoria proclaimed:

the crown was to 'abstain from all interference with the religious belief',

'generally, in framing and administering the law, due regard be paid to the ancient rights, usages, and customs of India'.
- Criminal laws were modeled on English precedents, to contain challenges to its rule.
- For collection of land revenue, legal system had to be able to adjudicate disputes of ownership and revenue.
- Codification of laws as statutory laws, except personal laws:
 - Indian Penal Code 1860,
 - Contract Act 1872,
 - Evidence Act 1872.
 - around turn of nineteenth century two Acts were enacted governing procedures for criminal and civil trials.

Corpus of Muslim family law expanded, on basis of, although limited, application of the Quran and the Sunnah, but constricted by contours of resolution of Warren Hastings in 1772 and Queen's proclamation. Muslims felt threatened by recognition and application of local customs by British Indian courts, in areas of family law,

System of personal laws, so developed, created two bodies of Hindu and Muslim laws, for Hindus and Muslims

as political communities, as a result of unequal legal treatment to Muslims, and deliberate colonial policy to 'divide and rule', in order to check any joint rebellion. By 1930s, the demand for political and legal identity increasingly became popular, that Muslims were a separate nation. Muslim demand for independence was that self-government should be such that it protected Muslims against Hindu majority. Living in accordance with Islamic law was different from living as a religious minority in Hindu majority state. Creation of separate state (Pakistan), was considered to be the only solution.

Politico-legal History

It is important to study history of various enactments, and how continuously the law has been secularized.

Personal law of communities has been applied, with differing social conditions.

In a situation where colonialists had brought Muslim rule in India to end, and alteration of their laws was evident, they faced crisis of identity and self-confidence. In First World War, British fought against Ottoman Empire. Khilafat movement pushed traditional *ulema* into independence movement, which used Islam as political prime mover. Execution and banishment of many prominent *ulema* was noticeable. Muslims obviously were not comfortable with imperialists as others could be. Khilafat Movement could not stop defeat of Ottoman empire and abolition of Caliphate. Hindu-Muslim entente came to an end, and communal tension increased during 1920s.

Muslims, although divided in outlook and approach, saw education, from their respective perspectives, as key to revivalism. Conservatives founded religious seminaries, such as Deoband, using British educational methodology, e.g.,

‘sequential curriculum, organised classes and paid teaching staff’, with the objective of moral reform, and adherence to literal interpretation of the Quran. Liberals aimed at acquiring Western knowledge and skills. Sir Sayyid Ahmed Khan, for example, founded Muslim University in Aligarh, in 1874.

Struggle for independence in 1910s-1920s was crushed with very harsh measures, including draconian Rowlatt Act in 1919 which removed many safeguards in criminal law.

Muslim Law Dispensed Under Doctrines of Other Legal Systems:

Colonial courts, staffed by British judges and administered by colonial government, left a deep impact on many indigenous laws. Law of **pre-emption**, *musha*, *waqf*, etc. are examples of Muslim Law which *have origin in and development under only Islam, but were being dispensed under doctrines and philosophy of other legal systems*.

In place of rules of Muslim law which were made *not applicable*, for example, in cases of criminal law, law of evidence, etc., English law was introduced by ‘*justice, equity and good conscience*’, which is found in numerous statutes and in fact in whole corpus of law. Gradual infiltration of English law into Islamic law in India is described by Hamilton J. (Kenya, East Africa) in a case of law of Wakf.

‘...The Mohamedan law in East Africa has, however, not been subjected to the same modifying influence as in India, and remains the same...’

Let us examine this with reference to at least one example in some detail:

There is difference between *Shufaa* under Islamic

jurisprudence and common law of pre-emption." Government of N-W.F.P. v. Said Kamal Shah **P L D 1986 S C 360**. Provisions exempting properties from pre-emption are not repugnant to Injunctions of Islam, Government of N-W.F.P. v. Said Kamal Shah **P L D 1986 S C 360**. Bases for the right of pre-emption in Islamic Law are as substantial as any other right. Musa Khan and 3 others v. Abdul Haq and another **1993 SCMR 1304**. Legislature cannot add to or restrict the right of pre-emption. Government of N-W.F.P. v. Said Kamal Shah **P L D 1986 S C 360**. State has no right to extend the right of pre-emption by adding or subtracting from the classes of person entitled to pre-emption. Government of N-W.F.P. v. Said Kamal Shah **P L D 1986 S C 360**.

In Islam, law of pre-emption is not akin to a permanent law but it is an exception to the general law of sale transaction.

Only those persons (categories) who have been permitted by the Holy Prophet (Peace be upon him) to be entitled to the exercise of right of pre-emption will be entitled to enforce it. Entitlement to claim pre-emption vests in only those persons who have been declared to be so entitled by the Holy Prophet (p.b.u.h.). No other person will be entitled to claim pre-emption on basis of merely Qiyas and 'Rai'.⁷⁴ Government of N.-W.F.P. v. Said Kamal Shah **PLD 1986 SC 360**.

The Holy Prophet (Peace be upon him) issued specific order for its advent. Government of N-W.F.P. v. Said Kamal Shah **P L D 1986 S C 360**. Nothing in Holy Quran itself is available on question of pre-emption and jurists rely on certain sayings of Prophet (Peace be upon him). Government of N-W.F.P. v. Said Kamal Shah **P L D 1986 S C 360**.

Some also hold that right to pre-empt cannot be said to be

a creation of Islam. Government of N-W.F.P. v. Said Kamal Shah **P L D 1986 S C 360**.

In Digambar Singh v. Ahmad, (1915) 37 All. 129, 140-141, 42 IA. 10, 18, 28 I.C. 34. their Lordships of the Privy Council said: "Preemption in village communities in British India had its origin in the Mahomedan Law as to pre-emption, and was apparently unknown in India before the time of the Moghal rulers. In the course of time customs of preemption grew up and were adopted among village communities.

Purpose of Islamic law of pre-emption is universally recognised as convenience and peaceful enjoyment of one's own property. Extension or curtailment of right is necessarily related to purposes which it serves. Government of N-W.F.P. v. Said Kamal Shah **P L D 1986 S C 360**.

Pre-emption is as a right where a person without the consent of vendee becomes owner of the property by paying the price of that property to the vendee. Government of N-W.F.P. v. Said Kamal Shah **P L D 1986 S C 360**.

Right of pre-emption is not "predatory". Hakam v. and others Muhammad Ramzan P L D 1985 Lah. 39; Siddique Khan and 2 others v. Abdul Shakur Khan and another **P L D 1984 S C 289**.

It could not be made vehicle of enrichment but was exercisable under extreme necessity. Muhammad Miskeen v. Summandar Khan and 2 others **PLD 1991 Lah. 217**.

Court can strike down exemption if *Zaroorat* is not established. N-W.F.P. through Chief Secretary and another v. Hussan Pari and others **P L D 1988 SC 144**.

It is a right of *re-purchase* from the buyer. (Kudratullah v. Mahini Mohan (1869) 4 Beng. L.R. 134; Humedmiya v. Benjamin (1929) 53 Bom. 525, 532-533, 1181.C. 543, (29) A.B. 206.

It is an incident of property. (Gobind Dayal v. Inayatullah (1885) 7 All. 776; Abdul Aziz v. Khainmnisa (1949) Nag. 740; Asad Ali Khan v. Muhammad Iqbal and 12 others **1991 MLD 365**, (Audh Bihari Singh v. Gajadhar ("54) A.S.C. 417, (1955) 1 S C R 70. *See also* Bishan Singh v. Khazan Singh ('58) ASC 838; Shco Kumar v. Smt. Sudama Devi ('62) A.P. 125; Ram Baran Prasad v. Ram Mohit ('67) A.S.C. 744 (where a pre-emption clause in a contract was held to be binding on assignees or successors-in-interest); Manzoor Hussian and others v. Bhole Khan and others **1991 C L C 640**. - but although it is essentially a right in rem, its exercise, from the time it arises up to the time of the decree, is restricted as a personal right, which is neither heritable nor transferable. - Mohd. Ismail v. Abdul Rashid (1956) All. 143 (F.B.), Government of N-W.F.P. v. Said Kamal Shah **P L D 1986 S C 360**.

The decision of the Supreme Court of India in *Audhi Bihari. Singh's case* was followed by the Karachi High Court and the Mahomedan Law of pre-emption was **applied on the ground of justice, equity and good conscience**. Allah Bux v. Jano and others **P L, D 1962 (W.P.) Kar. 317**.

As pointed out by the Privy Council—"...the Mahomedan Law relating to trusts differs fundamentally from the English law. It owes **its origin to a rule laid down by the Prophet of Islam**; and means the tying up of property in the ownership of God the Almighty and the devotion of the profits for the benefit of human beings..." Vidya Varuthi Thirtha Swamigal v. Baluswmi Ayyar and others **48 LA 302; A.I.R. 1922 PC 123**.

Section 27 of Regulation of 1780, laid down that in all suits of **inheritance, marriage and caste**, and other **religious usages or institutions**, the **law of the Quran with respect to Muslims**, was invariably to be adhered to. If one of the parties were Hindu or Muslim, **laws and usages of defendant**

applied.

Later developments in civil law gave jurisdiction, over Indian inhabitants of the Presidency towns, to newly established Supreme Courts, with proviso that matters of *specified personal laws*, were to be determined, by own laws of Muslims or Hindus; Where only one of the parties was Muslim or Hindu, by the "*laws and usages of the defendant*". "*Unwritten, yet ascertained common law*" (i. e. usage or custom) normally applicable to both parties was to be preferred. **Residual law** was applicable in Presidency Towns, and that of England, '*justice, equity and good conscience*', in Provinces.

Judges, the Company's servants, with even rudimentary knowledge of English law, and little knowledge of other systems, **increasingly resorted to English principles of law as '*justice, equity and good conscience***. There was a need for filling "gaps and interspaces" with uniformity and certainty. **Ultimately government resorted to piecemeal codification of law, based on English principles.**

In the field of criminal law, *Shariah* law was applied, except only in Bombay, to Hindus as well as Muslims. Its control was exercised at first through Muslim officials. "Under *Warren Hastings*, even *impalements* were permitted." In 1790 criminal justice was taken over by the Company. **Courts were presided over by Company's servant as Judge, assisted by Muslim "Law Officers"**. It was **duty of the latter to write a *fatwa*** (legal opinion) on relevant law, at the bottom of the record. It was duty of the Judge to pass sentence accordingly, provided it seemed to him consonant both with *Shariah* law and **natural justice**, except in regard to any sentence of death or life imprisonment, which required confirmation by appellate court. Where, *fatwa* seemed to be contrary either to **natural justice** or to *Shariah*, it was the duty of the Judge to transmit the case to the appellate court together with his comments; and if the court of appeal

considered the *fatwa* to be in accordance with *Shariah* law, but contrary to natural justice, they would accept it if the discrepancy was in the prisoner's favour, but recommend pardon or mitigation of sentence if it was to his detriment.

In 1790, **right of "heirs of blood" to pardon a murderer was taken away**, in 1791 **mutilation of hand for theft, or of two limbs in the case of highway robbery, was abolished**, and **seven and fourteen years' imprisonment, respectively, substituted therefor.**

In 1832, **non-Muslims were granted right to claim exemption from being tried under *Shariah* criminal law**, although no other law was provided to take its place! This meant that *Shariah* criminal law, however truncated and transformed, ceased to be general law of crime.

No uniform Law of Criminal Procedure existed previous to 1882. There were separate Acts to guide Criminal Courts in the erstwhile provinces and the presidency towns. The Acts of procedure applying to the provinces were replaced by the general Criminal Procedure Code (Act XXV of 1861). This was replaced by Act X of 1872. A uniform Law of procedure for the whole Sub Continent came into force for the first time in 1882 by Act X of 1882. It was supplemented by a new Code in 1898. This Act forms basis of the present Criminal Procedure Code of Pakistan. The Court of Criminal Procedure underwent drastic amendments in 1923, by two Acts, viz. the Criminal Law Amendment Acts, XII and XVIII of 1923.

Lord Macaulay, in 1837, submitted draft "Indian Penal Code", which was promulgated in 1860. Next four decades brought codification and legislation, e.g., First came Indian Penal Code 1860, followed by Contract Act 1872 and Evidence Act 1872, Indian Succession Act, Majority Act, and Transfer of Property Act. Around turn of nineteenth century two acts were enacted governing procedures for criminal and

civil trials. These were based on English principles; although **a few minor traces of Shariah law may be found.**

In 1861, courts for Provinces and Presidency towns were unified; and in 1864 services of Law Officers, Muslim and Hindu, were dispensed with. **Henceforth Shariah law, where applicable, was to be applied by the court itself as part of the law of the land.**

Fuqaha (Muslim jurists) mainly worked in area of law that could be derived directly from the texts. Whether state was 'secular' or 'Islamic'; the law that could be so derived, mostly related to and was practiced as personal (Muslim) law. *Hudood* and *Qisas* laws could be enforced by state. As Muslims lost sovereignty or priorities of state changed, extent of enforcement of such laws varied accordingly. Later, this practice was adopted by colonialists from Ottomans and Mughals.

Demand for Islamisation of family laws always remained in British India, as Muslims wanted to be governed by Islamic law as a community distinct and separate from Hindus. In 1937, Muslim members of Imperial Legislative Assembly passed Muslim Personal Law (Shariat) Application Act. The Dissolution of Muslim Marriages Act 1939, further fostered distinct legal identity of Muslims, as an apparent measure to improve legal position of Muslim women, although had a political purpose to prevent them from dissolving their marriage by converting to Hinduism. Section 4 of the 1939 Act provided:

'The renunciation of Islam by a married Muslim woman on her conversion to a faith other than Islam shall not by itself operate to dissolve her marriage'.

Hindus conditionally supported the 1939 Act that it did not apply to Muslim wives who had converted to Islam prior

to their marriage. Hence, the 1939 Act provided that section 4 of the Act did not 'apply to a woman converted to Islam from some other faith who re-embraces her former faith.' Thus, a Hindu woman who had converted to Islam could dissolve her Muslim marriage by re-embracing Hinduism without recourse to court of law.

"The purification of Islamic family law and the creation of a distinct legal identity of Muslims in the closing years of colonial India can be regarded as the first phase of the Islamisation of laws in Pakistan. In 1947, when Pakistan came into existence, the country inherited a body of Muslim personal laws, commonly referred to as Anglo-Mohammadan law, which was in the process of being returned to the principles of classical Islamic law. The birth of Pakistan in 1947 was not the outcome of demand for the creation of an Islamic state, but implicit in the demand for a homeland for British India's Muslims was a promise that Muslims would be governed by Islamic family laws not based on local, and potentially un-Islamic, customs and usages, but the principles of sharia." (*Sharia Incorporated*, edited by Jan Michiel Oto, Leiden University p.387)

In October 1945, in ulema conference, convened by Muslim League in Calcutta, All-India Jamiat-i Ulema-i Islam was founded, which organised party conferences in support of Pakistan. Its president, Allama Uthmani, later became member of Pakistan Constituent Assembly, on Muslim League ticket in elections of 1946.

Shariat Acts:

In certain cases, e.g., **courts departed from original rules regarding waqfs** (religious endowments) to lineal descendants. Therefore, the legislature intervened *through Waqf Act, 1913, and rules of Islamic law were made applicable*, and subsequently, retrospective also.

Muslim law of **Marriage, Divorce, Dower, Legitimacy, Guardianship, Gifts, Waqfs, Wills and Inheritance** was applied to Muslims everywhere in India. *Shariat Act, 1937, abrogated custom, restoring Muslim Personal Law in almost all cases.* Shariat Act, 1937, invalidated customs usurping rights of people, particularly *widows and orphans*, in derogation of Muslim law.

Before Shariat Act evidence was admissible to prove custom contrary to Muslim law. **The Act compelled Muslims to merge into broad Islamic community, and be governed exclusively by laws of Shariat.** This furnishes example of possibility of consolidation of the community, in a legal system which can solve their problems.

North-West Frontier Province Muslim Personal Law (Shariat) Application Act (VI of 1935) was far more drastic than the Central Act, for

- (i) it applied to agricultural land,
- (ii) it did not exclude charities, charitable institutions and charitable and religious endowments,
- (iii) it included betrothal and bastardy, and
- (iv) it applied *coercive*, instead of *persuasive* process, to wills and legacies.

North-West Frontier Province Muslim Personal Law (Shariat) Application Act (VI of 1935), Section 2 was as follows:

"2. In questions regarding succession, special property of females, betrothal, marriage, divorce, dower, guardianship, minority, bastardy, family relations, wills, legacies, gifts or any religious usage or institution including Waqf (trust and trust property), the rule of decision shall be the Muslim Personal Law (*Shariat*) in cases, where the parties are Muslims.

Except in so far as such law has been altered or abolished by legislative enactments or is opposed to the provisions of the North-West Frontier Province Law and Justice Regulation, 1901."

The Muslim Personal Law (Shariat) Act 1962 extended application of 1937 Shariat Act to agricultural land. *Shariat Act, 1962*, Section 2, also provides as follows:

"2. Notwithstanding any custom or usage, in all questions regarding **succession** (whether testate or intestate), **special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, legitimacy or bastardy, family relations, wills, legacies, gifts, religious usages or institutions, including waqfs, trusts and trust properties, the rule of decision, subject to the provisions of any enactment for the time being in force, shall be the Muslim Personal Law (Shariat) in case where the parties are Muslims.**" (Similar provisions were there in **East Punjab**.)

In Pakistan, exclusion of agricultural land from 1937 Act was removed in 1962, but in India, the exclusion continues in most states, thereby excluding women from inheriting agricultural land (Agarwal 2005).

Customary law was objected due to *uncertainty of ascertainment, rights of women were inadequate, in marked contrast to rights recognized by Muslim law.* **A custom, or usage even recognized by Courts could not be saved; unless it was embodied in enactment, in respect of the matters mentioned in Section-2.**

The scope and purpose of section 2 is to abrogate custom and usage in so far as these displaced rules of Muslim law. (Mohamed Aslam Khan v. Khalilur Rehman (1947) 51 C.W.N. 832, 231 I.C. 55, (47) A.P.C. 97. Suba Through his 8

L.Rs.v. Fatima Bibi through his 8 L.Rs.1992 SCMR 1721).

Punjab Amendment (2-A), inter alia, provided that where before commencement of Punjab Muslim Personal Law (*Shariat*) Application Act, 1948, a male heir had acquired any agricultural land under custom from the person who at the time of such acquisition was a Muslim he shall be deemed to have become, upon such acquisition, an absolute owner of such land, as if such land had devolved on him under the Muslim Personal Law (*Shariat*).

Section 2-A of Muslim Personal Law (Shariat) Application Act, 1962 added by Punjab Ordinance (XIII of 1983), gave retrospective effect.

Sections 3, 4 & 5 of Muslim Personal Law (Shariat) Application Act, 1962, further abrogated custom and promulgated Muslim law to protect rights of Muslim females in 'limited estates', will providing for more than one legatee, and succession under Muslim Personal Law (Shariat) upon death of last full owner or testator as though he had died intestate.

“As regards **interest**, it is doubtful whether the Mussalman rule prohibiting usury has been repealed by the **Usury** Laws Repeal Act 28 of 1855. (Ram La] v. Haran Chandra (1809) 3 B.L.R (O.CJ 130, 134 [not abrogated]; Mia Khan v. Bibijan (1870) 5 B.L.R. 500 [abrogated]”. The point arose in a Privy Council case, but it was not decided. (HamLraBibi v. ZubaidaBibi (1916) 43 LA. 294, 300, 3R All. 581, 587-588, 36LC.87)

As to *West Bengal, Bihar, Agra* and *Assam* territories except such. portions not subject to civil jurisdiction of High Courts, the **Civil Courts were to decide all questions relating to "succession, inheritance, marriage or any religious usage or institution", by Muslim law where parties were Muslims.** (Bengal, Agra and Assam Civil

Courts Act XII of 1887, section 37, read with Bengal and Assam Laws Act, 19(15, sections 2 and 3)

By Act 18 of 1949, **Madras State made Shariat Act applicable to agricultural land.**

In **East Punjab** "in questions regarding succession, special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, bastardy, family . relations, wills, legacies, gifts, partitions or any religious usage or institution," it was, inter alia, enacted by Punjab Laws Act IV of 1872, that “**the rule of decision shall be “the Mahomedan law, in cases where the parties are Mahomedans,....”**

Provisions of the **Ajmer-Merwara** Laws, Regulation III of 1877, **N.-W.Frontier Province** Law, Justice Regulation (Vilof 1901), and **Oudh** Laws Act XVIII of 1876 were almost to the same effect as the **Punjab** Laws Act IV of 1872.

In Madhya Pradesh, Central Provinces Laws Act XX of 1875, was to similar effect.

Sindh and Orissa were created by section 289 of Government of India Act, 1935. Before that, **Bombay** Regulation IV of 1827 applied to **Sindh**, and **Bengal. Agra** and **Assam** Civil Courts Act, 1887, applied to Orissa. The Orders in Council (dated 3rd March, 1936, No. 164 and No. 165) **did not affect any change as regards Muslim law.** The new province became subject to the **Shariat Act, 1937.**

In **Hyderabad State** area it was **not open to Muslim to set up and lead evidence of custom at variance with, or against principles of Muslim law.**

The Privy Council assumed that **Muslim law** applied to gifts in **Burma.**

There were Bahawalpur State **Shariat** (Muslim Personal Law) Application Act, 1951; and Khairpur State

Muslim Female Inheritance (Removal of Customs) Act, 1952.

Punjab Muslim Personal Law (*Shariat*) Application (Removal of Doubts) Ordinance, 1972 removed doubts that limited estates in respect of immovable property held by Muslim females under Custom were deemed to have been terminated with effect from 31st day of December, 1962.

Enforcement of Shariah Act 1991 demands from the state to establish Islamic economy and establish supervisory commission to oversee 'total elimination of *riba*'. *Riba*, in simple terms, means interest in financial transaction, such as loan. Precise translation, exact meaning and full explanation of the term *riba*, however, needs much elaboration, where views differ. In Pakistan, campaign to ban *riba* has been very visible but unsuccessful.

A change in section 4 of Enforcement of Shariah Act 1991, mandated judges to apply Islamic law to those areas not covered by statute. The Act, reiterates provisions of the Constitution and its Preamble.

'The Shariah, that is to say the injunctions of Islam, as laid down in the Holy Quran and Sunnah, shall be the supreme Law of Pakistan.' [Section 3(1)]

But its section 3(2) stipulates that legal position of current political system, national and provincial legislature, and existing administrative system, would not be reviewed by any judicial body. Rather than promoting Islamisation through courts, section 3(2) protects political system from judicial review for Islamisation.

Shariat Acts Restored Fundamental Rights, and Modernized Legal System in the Sub-Continent:

Islamic law of inheritance was a great improvement on pre-Islamic tribal customs, and all other prevalent laws and

customs, under which women inherited little or nothing at all. Islamic inheritance law, is a Command of God and legal obligation to be fulfilled in letter and in spirit. In 2003, Justice and Law Commission of Pakistan observed that women and children were often deprived of inheritance by multiple tricks and falsity. It directed to monitor compliance with inheritance law, especially pertaining to rights of women and children, but to date, no such action plan has been launched.

During British rule, influences on Muslim jurisprudence was broadened by:

- *-legislation, and*
- *-principles of justice, equity and good conscience.*

Muslim law, in India, was, and continues to be *Shariat*, *grafted* by principles of English common law and equity, in varying social and cultural conditions; even, in some areas, at variance with its original sources. **In a case it was observed:**

"In point of fact, the matter must be decided by equity and good conscience, generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances..."
(Waghela v. Sheikh Masludin (1887) 11 Bom. 551, 561, 14 LA. 89, 96)

Thus jurisprudence developed as what was called *Anglo-Muhammadian Law*.

Power of Courts to apply **Muslim law** was derived from and regulated by:

- (I) *Statutes of Imperial Parliament*, and
- (II) *Legislation:*
 - (i) express direction by Legislature, e.g., Succession and Inheritance;
 - (ii) *justice, equity and good conscience*,

(iii) certain Islamic criminal enactments were enforced, and corresponding provisions in Penal Code were omitted.

- **Rules of Muslim Law that were expressly directed to be applied to Muslims were to be applied except as altered or abolished by legislative enactment.**
- **Rules of Muslim law not expressly directed to be applied to Muslims, or excluded, expressly or by implication by legislative enactment, could not be applied.**

Compendia juxtaposed with Codification

For adjudication of wide range of disputes, particularly those to be decided under Hindu or Islamic law, judges of EIC courts were assisted by 'experts' in Hindu and Islamic law, until 1864. Elements of local, customary law were gradually replaced with orthodox, texts of interpretation of Hindu and Islamic law, aided by common law background of colonial judiciary, used to system of binding precedence, i.e., previously decided cases. Translations of treatises on Hindu and Islamic law, were used by judges to determine 'personal law' applicable to a dispute.

During British rule, *Hedayah*, *Sirajiyah* and small parts of some manuals were translated, as guide for deciding matters pertaining, particularly, to *Muslim Personal Law*. Privy Council said that they 'have endeavoured to the best of their ability to ascertain and apply the Mahomedan law, as known and administered in India'. Muslim law applicable was the law found in *Hedayah*, *Fatawa Alamgiri* and other such texts which had acquired authority. **Practice and theory had combined to give to such mediaeval legal manuals an inviolate validity.** These, however, were not *codes* in modern sense of the term, as these were not binding. These cover wider spectrum of

Islamic law, expounded by *fuqaha*"; not the law administered by state.

Hedayah (Guide) was composed by Shaikh Burhan-ud-Din Ali (12th century), principally recording doctrines of *Hanafi* school. It was translated from original Arabic into Persian by four Maulvis (Muslim lawyers) and from Persian into English by Charles Hamilton, by order of Warren Hastings, Governor-General of India. It deals with almost all topics of Muslim law, except Law of Inheritance. (See Grady's Edition of Hamilton's *Hedayah*).

Fataawa Alamgiriya is based on model of *Hidyyah*. *Fataawa*, work of great authority, was compiled in seventeenth century under orders of Aurangzeb Alamgir. It is "collection of the most authoritative *fatwas* or expositions of law on all points that had been decided up to the time of its preparation". It expounds *Hanafi* rules, almost on all topics of Muslims law.

Imamiyah is another important compilation.

Baillie's 'Digest of Mahomedan law' Vol. I is founded mainly on *Fatawa Alamgiri*.

Baillie's Digest Vol. II is based on *Sharaya-ul-Islam*.

Sharaya-ul-Islam is leading work on Shia law.

Al-Sirajiiyyah compiled by Shaikh Sirajuddin was translated by Sir William Jones (Rumsey's edition).

Al Sharifiyyah is commentary on *Sirajiiyyah*, by Sayyed Shariff.

Restrictions Imposed on Shariah Law

Shariah law was, gradually, formatted and even excised by statute law, based on Western law, from all spheres of crime, evidence and procedure. Principle of justice,

equity, and good conscience was applied. **Personal law was also superseded in certain respects.**

See following also:

Application of Islamic laws to religious institutions in Punjab. Its historical consideration and examination. Punjab Laws Act (IV of 1872), Section 5, Muslim Personal Law (Shariat) Application Act (XXVI of 1937) and Muslim Personal Law (Shariat) Application Act (LX of 1948). Faqir Muhammad Khurshid and others Vs. Chief Administrator of Auqaf. [NLR 1987 SCJ 252].

Examples of **restriction on Shariah Law by statute law** are many, e.g., the Caste Disabilities Removal Act, 1850, abolished that one who "apostasises" from Islam, no right to inheritance should be lost. Minimum age of marriage was raised by Child Marriage Restraint Act, 1929. Age of majority was raised by Indian Majority Act. Rules governing presumption of legal paternity in Evidence Act were held to displace some principles of Shariah.

Customary law in some cases, restricted application of Shariah, e.g., for Cutchi Memons and Ismaili Khojas, who retained by custom for centuries their Hindu law of inheritance, till Shariat Act of 1936 and Cutchi Memon Act of 1938. Shariat Act was made applicable to Khojas also in regard to intestate succession, and, if they opted, in regard to testamentary dispositions too. This did not extend to agricultural land.

In many cases colonial courts recognized local customs as applicable law. If Muslims were governed by local customary usage, they lost identity by ordering life in accordance with laws not connected with their religious identity as Muslims but based on non-Muslim legal traditions, such as exclusion of females from right to inherit.

Shariah law was restricted in its application, and even altered in its content, in so far as courts were concerned, by case law, on principle of *stare decisis*. "*Sometimes this has been the result of a deliberate modification of the law on equitable principles; sometimes because the court did not understand Shari'a law and resorted to English principles instead; and sometimes as a consequence of a straightforward misunderstanding of the Arabic texts.*"

Courts were to interpret law and were not bound by opinion of experts. In other respects, Muslims in India were governed by general law. Questions of estoppel and transfer were decided under general civil law and not under Muslim law, even where parties were Muslims. Courts were governed by their own procedure. Muslim law purely of procedure was not applicable.

Certain parts of laws of England were preserved by Constitution of India, Art. 372(1); and such parts of English law as were in force before commencement of the Constitution, and were not altered, repealed or amended, remained the law of the land until they are expressly repealed. (*Bank of India v. Bowman* (1955) 57 Bom. L.R. 345, 364).

Rules of Muslim Law that were expressly directed to be applied to Muslims were to be applied except as altered or abolished by legislative enactment. Rules of Muslim law not expressly directed to be applied to Muslims, or excluded, expressly or by implication by legislative enactment, could not be applied.

Power of Courts to apply Muslim law was derived from and regulated by Statutes of Imperial Parliament read with relevant provisions of the Constitution, and mostly by legislation, i.e.:

(i) express direction by Legislature, e.g.,

Succession and Inheritance; and

- (ii) *justice, equity and good conscience, e.g., rules of Muslim law of Pre-emption.*

Islamic criminal law, successively modified, remained in force, till 1862, when Indian Penal Code and Code of Criminal Procedure came into force. ***Penal Code and Code of Criminal Procedure, was not expressly directed to be applied, on grounds of justice, equity and good conscience.*** Certain Islamic criminal enactments were promulgated and enforced, while corresponding provisions in Penal Code were omitted.

For evidence, Islamic law was abolished when Evidence Act came in 1872. Muslim law of contract was almost entirely superseded by Contract Act, 1872, and other enactments. Companies Act (1913), **Shariat Act (1937)** and other laws were promulgated.

Consider following observations of *Mr. Justice Hidayatullah, former Chief Justice of India:*

“In India, the Islamic Law of Evidence, Crimes, Sales, Obligations does not obtain. Some of the pure doctrines of Islamic Law have also been watered down by judicial dicta. For example, inroads into pure rules of Islamic Law have been made by strictly limiting the doctrine of ***Mushaa***. One such way is, to extend the meaning of 'indivisible property' to include within it property capable of division but which is likely to lose in value by division....”

Interpretation and Application of Rules:

Examine following from Asaf A.A. Fyzee's Outlines of Muhammadan Law (Fourth Edition, p.81-87):

Some hold that Muslim law has been studied, analysed, in some cases codified, and commented upon for fourteen

centuries, and the texts have achieved authoritative status. It is, therefore, not desirable for courts to put their own construction on clear and definite opinions of text-writers.

As to the Quran, courts should not speculate on the mode in which the text quoted from the Quran is to be reconciled with the ***law as laid down in the Hedaya*** and by the author of the passage quoted from ***Baillie's Imameea***. ... *It would be wrong for the courts on a point of this kind to put their own construction on the Koran in opposition to the express ruling of commentators of such great antiquity and high authority.*

Similarly, as to the precepts of the Prophet (Peace be upon him), Privy Council held that *new rules must not now be deduced by courts.* The *Locus classicus* on the subject is the judgment of Sir Arthur Wilson to be found in *Baker Ali v. Anjuman Ara.*

Danger of departing from classical texts was pointed out in a Madras decision:

We have, therefore, to administer without in any way circumventing or deviating from the original texts, the law, as promulgated by the Islamic Law-givers to suit the present-day conditions, and, in doing so, it has to be remembered that Courts are not at liberty to refuse to administer any portion of those tenets even though in certain respects they may not sound quite modern.

As to classical texts, Chagla J., however, sounded warning against following them slavishly:

Now there is no doubt that these ancient Muslim texts must be considered with the utmost respect. But it must also be remembered at the same time that ***Muslim jurisprudence is not a static jurisprudence.*** *It is a jurisprudence which has grown and developed with the times and the quotations from Muslim texts should be so applied as to suit modern circumstances and conditions.* It is also

dangerous to pick out illustrations wrenched from their context and apply them literally. Illustrations merely illustrate a principle and what the **Court should try to do is to deduce the principle which underlies the illustration.**

A difficulty, however, does arise when the judge is faced with a conflict of opinion among jurists of authority. Here we have the most fruitful source of error and both Abdur Rahim and Tyabji have shown *why the law has sometimes not been correctly appreciated in Indian courts.* Abdur Rahim deals with 'complexity, uncertainty and artificiality' of Islamic legal system. Tyabji shows how *exposition of Islamic law in India suffers from unfamiliarity with the language of the texts and social conditions when they came to be written,* and unwarranted assumption that the texts are confused, inconsistent or inaccurately expressed.

Differences of opinion among authorities are found in number of questions, mainly emerging from divergences due to age and provenance, apart from discrepancies in transmission of texts, imperfect recensions and inaccurate renderings.

Hedaya translated by Hamilton, and Baillie's *Digest*, Vol. I & II, are continuously cited by Bench and Bar. Baillie's renderings are considered to be more successful than Hamilton's.

Considered chronologically, *Hedaya* comes first. Burhan al-din Marghinani (died in A.H. 593/A.D. 1197), lived and wrote in Marghinan, in Farghana, in Turkestan, to east of Bukhara. *Hedaya* was commentary by author himself on his smaller work, '*Bidaya*'.

Next comes the *Shara al-Islam*, the leading text of Ithna Ashari Shiite law. It was written by Najm al-din al-Hilli

who died in A.H. 677/A.D. 1277. He lived mostly in Hilla, a small town in the district of Baghdad.

And lastly, the *Fatawa Alamgiri*. It is a collection of *fatwas*, or the replies of jurisconsults to the questions addressed to them, composed by Shaykh Nizam Burhanpuri and four others under the orders of the Emperor Awrangzeb Alamglr during the eleventh century Hijri/seventeenth century A.D. The scene of their labours was, therefore, Delhi or the neighbouring districts.

It is hardly necessary to dilate upon the variations in economic conditions, social life and cultural values during these three periods in such widely divergent lands. A triangle drawn on the map of Asia with Samarkand, Baghdad and Delhi as its points is sufficient for our purposes. And, if in addition it is remembered that printing was unknown, that copyists naturally made errors, that the law was expounded all over the world, and that not every cadi could be a finished scholar of Arabic - a language whose grammatical complexities and idiomatic subtleties are both bewildering and fascinating - the surprising thing is, not that there are differences, but, that they are on such comparatively minor points. The Four Imams and their disciples cast the law in an iron mould and gave it a stable pattern; and the labours of the later jurists remind one of the ancient story of old wine in new jars.

When the ancient authorities differ in their opinions what is the duty of the *Kazi*. The earlier texts laid down precisely what his duties were. In modern times the word *kazi* has been rendered 'magistrate' by Hamilton, but in Muhammadan law there is no distinction between civil or criminal law. In the British system, the *kazi* means the Civil Court; and therefore **it is for the judge to decide for himself which opinion he will**

follow and why.

Earlier decisions seem to lay down that in the case of Hanafi law, where the two disciples, *Cadi* Abu Yusuf and Imam Muhammad al-Shaybani differed from their Master, the Great Imam (*al-a'zam*) Abu Hanlfa, the opinions of the disciples prevailed. There are also cases which go to show that under certain circumstances the opinion of one or other of the disciples is to prevail ; but the correct view is that *'when Muslim jurists of authority have expressed dissenting opinions on the same question, the courts, presided over by the kazi (a civil court judge), have authority to adopt that view which the presiding officer is of opinion, is, in the particular circumstances, most in accordance with justice'*.

The question of divergent authorities has been fully and authoritatively discussed by Sir Shah Muhammad Sulaiman C.J. in *Anis Begam v. Muhammad Istafa*. (1933) 55 All. 743, 752-3; *Cases*, 18, 24-5. See also the observations of Tyabji J. in *Ebrahim Alihahai v. Bai Asi* (1933) 58 Bom. 254, esp. 259-60.)

Their Lordships of the Privy Council in the case of *Aga Mahomed Jaffer Bindanim v. Koolsom Beebee*, remarked: 'But it would be wrong for the courts on a point of this kind' (the right of the widow to inherit) 'to attempt to put their own construction on the Quran in opposition to the express ruling of commentators of such great antiquity and high authority' (as the *Hedaya* and the *Fatawa 'Alamgiri*). It is the practice of the great commentators to state the difference of opinion which at one time prevailed on a particular point and then to add on which view is the *fatwa*, or which is the more correct or stronger view, or

to use other expressions of like import. But where the learned commentators content themselves with a mere statement of the conflict of opinion without expressing any definite opinion of their own in favour of one or the other view and without saying anything about the consensus of opinion or the *fatwa* being in accordance with a particular view, they imply that the **conflict of opinion was still continuing and that no unanimity or general concurrence had till then been obtained. This would have the effect of leaving the question open. The Qazi would then be free to choose whichever of the two opinions appears to him to be the sounder and better adapted to the conditions and the needs of the times.**

In the case of the Shiite law, Sulaiman and Mukerji J J. had previously held that the *Sharai'al-Islam* is the leading authority and also that *'where there are two opinions on a point of Muhammadan law, the court should accept only that opinion which is in consonance with justice, equity and good conscience'*,

While the question of divergent authorities is being discussed, it must never be overlooked that **we are only discussing a case which is not covered by modern authority. A judge in an Indian or Pakistani court, it is hardly necessary to insist, cannot decide in opposition to a decision of the Privy Council, the Supreme Court, or to a series of decisions of the High Court which he represents, or to which he is subordinate; in such cases the doctrine of precedent applies.**

Judicial discretion vested in the court can only be exercised where the authorities of the same school differ amongst themselves; the court is not entitled on the score of

social justice to adopt a rule taken from another school of Islamic law. This course is for the legislature in a modern state and not for the judiciary. (Asaf A.A. Fyzee, *Outlines of Muhammadan Law*, Fourth Edition, p.81-87)

In interpretation of the texts and the express rulings, *conservative approach* was adopted, e.g.:

Courts, in administering Muslim law, should not, as a rule, attempt to put their own construction on the Koran in opposition to the express ruling of Muslim commentators of great antiquity and high authority. A passage of the Qoran (2-241 & 242) was interpreted in a particular way in *Hedaya* and *Imamia*, it was held by Privy Council that it was not open to Judge to construe it in different manner. (Ata Mahomed Jaffer v. Koolsom Beebee (1897) 25 Cal. 9, 18, 24 LA. 196, 204). The law is the same, in Pakistan

. (Maula Bux v. Charuk P L D 1952 Sind. 54.)

This approach had other implications also. *Inertia* for any development in *Shariat related rule, on the part of Muslim jurists*, and aversion to any change was combined effect of *taqlid*, and *common law doctrine of precedent*, i.e., *judge was to interpret and follow, rather than create and expand law*.

Rules of Muslim law of **Pre-emption** were not applied by Courts on the ground that these were opposed to justice, equity and good conscience, as these place restrictions upon liberty of transfer of property by requiring the owner to sell it in the first instance to his neighbor of the property. High Courts of Bombay and Allahabad, on the other hand, applied these to Muslims that the **notion of "justice, equity and good conscience" held by those Courts differs from that held by the Madras High Court.** (Ibrahim v. Muni (1870) 6 M.H.C. 26).

In a case it was observed "In point of fact, the matter must be decided by equity and good conscience, generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances..." (Waghela v. Sheikh Masludin (1887) 11 Bom. 551, 561, 14 LA. 89, 96)

As regards rules which the Courts have been *expressly* directed to apply to Mahomedans, they must of course be applied regardless of considerations of justice, equity and good conscience. Thus the rules of the Mahomedan law of Marriage have been expressly directed to be applied to Mahomedans. Where a rule of Mahomedan law is well-settled in the view of the ancient expositors thereof, it is not open to the Court to disregard or reject it on the ground that it is illogical or unsound, provided of course, it is not contrary to justice, equity and good conscience, on which ground alone the right is enforced at the present day. (Mohammad Ismail v. Abdul Rashid (1956) 1 All. 143, 154 (F.B.).

The rules of equity, good conscience and public policy as contained in Islamic Jurisprudence should be applied in situations not directly covered by Quranic or Traditional text or Ijma, or binding Qiyas. It is not permissible for Courts in Pakistan to apply and import any rule of English law relating to equity, justice and good conscience, (Nizam Khan v. Addl. District Judge, Lyallpur and others P L D 1976 Lah. 930)

There are rulings also where 'Mahomedan law' is applied in cases of pre-emption, as the rule of justice, equity and good conscience.

English law recognises ownership of land limited in duration; Muslim law admits only ownership unlimited in duration, but recognises interests of limited duration in the use of property. Similarly, family and inheritance laws, although,

have re-introduced some Shariah rules, but many aspects have been codified using British legal terminology.

Though same terminology may be used in English and Muslim laws, to describe a similar case, the two systems of law are based on quite different conceptions of ownership. Furthermore, there are other differences of doctrines and usage, due different structures of legal systems, e.g.:

According to English rule, founded on doctrine of Common Law, husband becomes entitled on marriage to whole of wife's personal property and income of her real property. Under Muslim Law, husband does not by marriage acquire any interest in property of wife. Therefore rule of English law cannot be applied to dissolution of marriage between Muslims.

In Shariat there is no bar of limitation to institution of suit or other legal action for enforcement of right in property or *in personam*. Baluch Khan v. Lai Bibi **P L D 1972 S C 84**.

There is no prohibition in Muslim law to create a charitable trust as in English law. Distinction between a wakf and an English Charitable trust pointed out. Mariam Bai v. Mohd. Jaffar Abdul Rahiman Sait and others **A.I.R. 1973 Mad. 191**.

In Muhammadan Law *wakf* differs from a Trust. Saira and 11 others v. Settlement Authorities **P L D 1973 Lah. 327**.

From the above, the two sides of "justice, equity and good conscience" become obvious. Juxtapose with the following also:

The Mahomedan law of pre-emption is applied by 'the Courts of India to Mahomedans as a matter of "justice, equity and good conscience," except in

the Madras Presidency where the right of pre-emption is not recognised at all [unless by local custom as in Malabar]. Krishna Menon v. Kesavan (1897) **20 Mad. 305**.

The reason given by the Madras High Court in the earliest case on the subject for refusing to recognise the right is that the law of pre-emption places a restriction upon the liberty to transfer property, and is therefore **opposed to 'justice, equity and good conscience'**. The right of pre-emption in that case was claimed on the ground of vicinage. Ibrahim v. Muni Mir Udin (1870) **6 MH.C. 26**.

How to Resolve Contradictions:

Quranic Injunctions clearly prohibit reliance on principles and sources of law other than those of Islam where such course is not prohibited by Constitution and law. (Nizam Khan v. Addl. District Judge, Lyallpur and others **P L D 1976 Lah. 930**.)

Decision must follow according to guidance given by Holy Quran failing therein on tradition of Holy Prophet (Peace be upon him) and still failing on Qazi's own discovery of rule after full consideration from his own wisdom. (Fida Hussain v. Mst Naseem Akhtar and another **P L D 1977 Lah. 328**. But see Mat. Khurshid Bibi v. Babu Muhammad Amin **PLD 1967 S C 97**. Fatawa-i-Alamgiri, Vol. III, Part I; Book of Evidence, p. 534 and Abu Bauds under Translation, Vol. III, p.94.)

Some suggestions made by different institutions and segments of society in this regard:

- Council of Islamic ideology, in consultation with Law Division, recommended to modify law relating to pre-emption, to bring it in conformity with the Injunctions of Islam as set out in the Holy Qur'an and Sunnah. **In interpretation and application of provisions of the Act, Court was to seek guidance from the Holy Quran, the Sunnah and Fiqh. The provisions of the Act have effect notwithstanding anything contained in any other law for the time being in force. Any party to a proceeding under the Act may, in addition to, or instead of, an advocate engage an *Alim* who is qualified as such from a *Deeni Madrasah* approved by Provincial Government for this purpose. Matters ancillary or akin to the provisions of this Act which have not been specifically covered under any provision thereof shall be decided according to *Shariah*.** Government may, in consultation with Council of Islamic Ideology, make rules necessary to carry out purposes of this Act.
- (In) Pakistan while passing through transformation from English to Islamic judicial norms, the process must, keeping in view development of English judicial system, follow its own rules of natural justice as contained in Islamic "accepted judicial norms" and fundamental principles and basic concepts of Islam and seek inspiration from its own Constitution, ideology, history and environment. (Nizam Khan v. Addl, District Judge, Lyallpur and others **P L D 1976 Lah. 930**.)
- **Codification and Enforcement:**
 - Commands and prohibitions contained in the Holy Quran and Sunnah having not been codified in Azad Kashmir, Courts cannot decide

the matter in accordance with such commands. (Muhammad Niaz Khan v. Azad Government of the State of Jammu and Kashmir **PLD 1988 S C (AJ&K) 53.**)

- Where these laws are codified, the same have to be enforced accordingly, e.g., laws on offences of *Zina* and *Qazf* have been codified in *Hudood Laws*.
- **Partial codification** as in Egypt, and Dissolution of Muslim Marriages Act, 1939, in India, is one kind of remedy.
- Sympathetic legislation, which may gradually bring all communities under one uniform law.

Pakistan's case:

Indian Independence Act of 1947 (British Act of Parliament) designed new legal system on independence. Section 18(3) provided for continued validity of colonial laws. However, section 6 provided that 'The legislature of each of the new Dominions shall have full power to make laws for that Dominion, including laws having extra-territorial operation'. Section 18(3), rather than section 6, played more important role in determining Pakistan's indigenous politico-legal system. Until adoption of Constitution of 1956, Pakistan was governed under arrangement of 1935 Government of India Act, as modified by Indian Independence Act, and as adopted by Pakistan (Provisional Constitution) Order, 1947.

It had been held, as pointed out earlier, above, that certain parts of the laws of England had been preserved by the **Constitution of India**, Art. 372(1); and that such parts of the English law as were in force before the commencement of the Constitution, and have not been altered, repealed or amended, remain the law of the land until they are expressly

repealed.

Under original proposal, First Constituent Assembly was suggested to frame a constitution for whole of British India. But Muslim League demanded separate assemblies, for drafting constitutions of Pakistan and India. Pakistan's Constituent Assembly was created by Notification of Government of India on 26 July 1947, and convened on 10 August 1947. It acted as Legislature also during transition period.

Pakistan adopted entire colonial legal legacy and its codes, with legal values, procedures, and laws of Great Britain, without Islamic modifications. All such laws continue to retain British character. Judiciary continued to remain self-contained, professional and socially conservative, with education and training in English Common Law. Despite frequent constitutional and political disruptions, legal system retained its colonial character. Constitutional provisions to bring all laws in conformity with Islam remained unenforced. Judiciary never showed activism in these matters. Only in a few cases of reform, for example, judiciary extended right of Muslim women to seek judicial divorce, or referred to Islam in matters of democracy, constitutionalism, or areas not covered by statutory laws.

Question of Pakistan's national identity as Muslim state has significant impact on political and legal developments. In constitutions of 1956, 1962, and 1973, Islam was, although, given central, but largely symbolic, role. However, after 1977, promulgation of Islamic criminal laws, and provisions in the Constitution 1973, including creation of Federal Shariat Court in 1980, are significant.

There still echo divergent voices from civil society, not in consonance with political consensus, on role of Islam in legal system, more visible in controversies over criminal laws promulgated in 1979, and questions of introduction of Islamic

banking and finance. On the other hand some religious segments consider that through West Pakistan Auqaf Properties Ordinance 1959, the government took over control of Muslim charitable trusts in order to weaken influence of traditional *ulema*.

Delay in drafting the Constitution was due to the effort to satisfy secularists, sectarians, and federating units. During 1949-1956, all the three draft constitutions incorporated that laws should be in accordance with Islam: to make substantive laws that conform with Islam and to empower higher judiciary to strike down laws found not in accordance with Islam.

Furthermore, there were not only complex systemic issues involved but there were basic and fundamental questions which were to determine the very nature and content of the constitution itself.

Hart shows that modern legal system, as distinguished from primitive, comes into existence through *union of primary and secondary rules*. Islamic legal system also can operate only through **union of primary and secondary rules**.

Hans Kelsen presented idea of basic rule or norm (*grundnorm*) as unifying, and laying foundations of legal system. Muslim jurists postulate *basic norm*, and give details of *rule of recognition* that flows directly out of this *grundnorm*.

In *Miss Asma Jilani Vs. The Government of The Punjab* and another **PLD 1972 SC 139**, Chief Justice Hamoodur Rahman observes:

In any event, if a *grundnorm* is necessary for us, I do not have to look to the Western legal theorists to discover one. Our own *grundnorm* is enshrined in our doctrine that the legal sovereignty over the entire universe belongs to Almighty Allah alone, and the authority exercisable by the people within the limits prescribed by Him is a sacred trust. This is

an immutable and unalterable norm which was clearly accepted in the Objectives Resolution.

It was advocated that Objectives Resolution had become part of the Constitution; with **supra-constitutional** status. "Resultantly, any of the existing provisions of the Constitution which conflicts with its terms and is inconsistent or repugnant to its principles and provisions has become inoperative and of no legal effect and can be so declared by the Courts." (PLD 1992 SC 595, 612) Chief Justice Nasim Hasan Shah held:

Constitution of Pakistan undertakes not to enact any law repugnant to the injunctions of Islam and to bring all existing laws in conformity with such injunctions. The judiciary is to apply Principles of Islamic laws on principles of justice, equity and good conscience. Rules of equity and equitable considerations commonly recognised in Courts of Equity in England are often referred and invoked in adjudication of cases under that system. **Shariat law being based on principles of equity (*adl*), justice (*qist*) and good conscience (*ihsan* and *fadl*)**, it should be applied in preference to English rules of equity.¹⁵ (Abdul Rehman Mobashir v. Amir Ali P L D 1978 Lah. 113). (Arabic words in *italics*, added).

First draft of Constitution (1950)

India's Constitution was passed on 26 November 1949.

Pakistan's First draft Constitution contained policy provisions: Objectives Resolution was made a preamble, and there was to be 'compulsory teaching of the Holy Quran to the Muslims'

The Objectives Resolution was the first product of Constituent Assembly. It reflected construct and

configuration of India's Objectives Resolution, adopted by India's Constituent Assembly on 22 January 1947. Introduction of Objectives Resolution in first Constituent Assembly of Pakistan on 7 March 1949, set a general direction and frame for law makers. Basic Principles Committee was constituted by first Constituent Assembly on 12 March 1949, to report in accordance with the Resolution. It suggested, *inter alia*, that suitable steps should be taken to bring existing laws in conformity with Islamic principles, and for codification of such Injunctions of the Holy *Quran* and the *Sunnah* to give them legislative effect. No legislative body was to enact any law, repugnant to the Holy *Quran* and the *Sunnah*.

Second draft of Constitution (1952)

Second draft Constitution, in 'Directive Principles of State Policy' enjoined:

- to eliminate *Riba*, to prohibit 'drinking, gambling and prostitution in all their various forms',
- to promote and maintain Islamic moral standards,
- to promote the understanding of Islam, and
- to bring 'the existing laws into conformity with the Islamic principles'.

But these could not be enforced in a court of law.

The 'Procedure for Preventing Legislation Repugnant to the Quran and the Sunnah', provided that all legislation was to be in accordance with Islam. This envisaged to set up 'Board consisting of not more than five persons well versed in Islamic Laws', to examine law on basis of Islam. Fate of its recommendations could be decided by simple majority in joint sitting of the two houses of parliament. Thus, the

Islamic repugnancy clause applied to prospective laws only and spared legacy of colonial laws.

Third draft of Constitution (1953)

Constituent Assembly on 7 November (1953), made Pakistan an 'Islamic Republic'. On 6 October 1954, it adopted third draft of Constitution. It retained that Legislature should not 'enact any law which is repugnant to the Holy Quran and the Sunnah' but provided that 'the Supreme Court alone should have jurisdiction for determining whether or not a particular law is repugnant to the Holy Quran and the Sunnah'.

On 24 October 1954, Constituent Assembly was dissolved.

Fourth draft of Constitution (1956)

Second Constituent Assembly, members elected from existing provincial legislative assemblies, approved fourth draft of Constitution, adopting some of Islamic features of first draft of Constitution:

- Objectives Resolution made Preamble,
- Islamic provisions of 'Directive Principles of State Policy' were largely unchanged.
- head of state had to be Muslim,
- repugnancy clause was made wider, providing that no law should be enacted contrary to Islam, and
- existing legislation should be brought into conformity with Injunctions of Islam.

It could not be enforced by a court, but was to be implemented by a board of experts who had to make recommendations to National Assembly within five years.

Latter was not bound to adopt the recommendations. Thus, none of Islamic provisions could be implemented.

Laws (Continuance in Force) Order, 1958, Basic Democracies Order, 27 October 1959, Constitution of 1962 (1 March 1962):

On 7 October 1958, in coup d'état, the 1956 Constitution was replaced by a Laws (Continuance in Force) Order, 1958, which was then replaced by the Basic Democracies Order, promulgated on 27 October 1959. After four years of martial law, a new Constitution came into force on 1 March 1962.

Islamic provisions of 1962 Constitution were largely on the pattern of 1956 Constitution, but many references to Islam were omitted:

- official name of Pakistan was changed to simply Republic of Pakistan.

(Name had already been changed by Presidential Order to 'Pakistan' shortly after the coup d'état, on October 11, 1958.)
- In the text of the Objectives Resolution in the 1962 Constitution, the original provision that 'the authority exercisable by the people within the limits prescribed by Him (Allah) is a sacred trust', was shortened to 'the authority exercisable by the people is a sacred trust', thereby removing any limitation on the legislative powers of the people.

The Constitution (First Amendment) Act 1963 restored original wording of Objectives Resolution and renamed the country as 'Islamic Republic of Pakistan.'

- Along with other Islamic provisions, a constitutional provision that all laws should be in accordance with

Islam contained in a chapter on 'Principles of Policy' was unenforceable.

- An Advisory Council of Islamic Ideology was to prepare annual reports on the Islamic legitimacy of new and existing laws, but such advice was not binding on Parliament.

But there was no serious attempt to implement this requirement to make all laws conform with Islam.

- 1962 Constitution protected against judicial review of Muslim Family Laws Ordinance (MFLO) 1961 (covering divorce, marriage and inheritance), which was based on recommendations of Commission on Marriage and Reform (1955).

MFLO, 1961, represents moderate interpretation of Muslim family law:

- it regulates rights of men for divorce and polygamy.
 - it provides that a husband who wants to marry a second wife has to seek permission of Union Council, which assesses whether that is 'necessary and just' (MFLO, section 6(3)).
 - valid reasons for second wife include 'sterility, physical infirmity, physical unfitness for conjugal relations, willful avoidance of a decree for restitution of conjugal rights, or insanity on the part of the existing wife'
 - if husband enters into polygamy without permission of Union Council, first wife can seek divorce and the husband is liable to be punished with fine or imprisonment (MFLO, sections 5(a), 5(b)).
- it also regulates right of husband to repudiate his wife:

- Section 7(1) MFLO recognises traditional unilateral repudiation (*talaq*) by husband, but through compulsory procedure. Repudiation becomes legally valid ninety days after mandatory notification thereof to Union Council, and to his wife. Failure to abide by this obligation is punishable by imprisonment up to one year or with fine of Rs. 5,000. Union Council forms mediation commission, to attempt reconciliation between the husband and his wife. Divorce becomes valid after expiry of ninety days, if no reconciliation is possible within this period. In absence of notification of divorce to Union Council or the wife, divorce is treated as invalid.
- Section 8, MFLO confirms that husband can, at the time of marriage, delegate right of divorce by repudiation to his wife.
- case law has extended right to Muslim women to seek judicial dissolution of marriage, even solely on basis of own testimony that they can no longer live 'within the limits of Allah', and can obtain *khula* on basis of 'personal aversion', which needs no further proof.

"The criminalisation of adultery and fornication as a result of the Zina Ordinance 1979, however, had an *unintended effect* on the umbrella of procedures initially designed to offer some protection of women's rights. After the passing of the law, abandoned wives who had since remarried were unexpectedly accused of adultery by their former husbands, the latter claiming that because they had not followed the procedures contained in Section 7 of the MFLO, they had never validly been

divorced, and hence were guilty of adultery. In order to protect the women involved, judges dealing with these cases often decided that the divorce had been valid, despite non-compliance with the MFLO, thereby weakening the obligatory character of the mandatory notification. Consequently, some have claimed that men's right to repudiation is once again governed by the classical sharia rather than the MFLO (Menski 1997: 30-31), but an analysis of recent legal rulings shows that Section 7 is being upheld in cases concerning purely family, not criminal law, matters. The Protection of Women Act 2006 has finally put the matter to rest by providing that it is sufficient for a woman to believe herself to be validly married to avoid a charge of adultery. Thus, even if the divorce preceding her re-marriage turns out to be invalid, she will not face charges as long as she can convince the court that she had reasons to believe that the divorce and her subsequent marriage were valid (Martin Lau, 2007, pp416-417.).

- During the period of 1962 Constitution, judiciary insisted on its right to review constitutional validity of all laws, not linked to Islamisation but concerned rights of judiciary to enforce fundamental rights.

1972 Interim Constitution, Constitution of 1973

In April 1972 interim constitution was introduced, and on 14 August 1973, National Assembly as Constituent Assembly adopted 'Constitution 1973.'

- It adopted earlier approach to bring all laws in conformity with Islam and to set up advisory body on Islamic law.

- It contained a chapter titled 'Islamic Provisions', that provided to set up a Council of Islamic Ideology, with advisory role, without inherent jurisdiction to ensure that its recommendations were acted upon by Parliament.
- No law could be challenged in judicial review that it was found to be repugnant to Islam by Council of Islamic Ideology.
- Prime Minister and President had to be Muslims, and their oath of office included a statement to the effect that they believed in 'the Prophethood of Muhammad (peace be upon him) as the last of the Prophets and there can be no Prophet after him,
- Islam was declared to be the state religion.
- Amendment passed unanimously to Article 260 of Constitution 1973 defined Muslim as:

A person who does not believe in the absolute and unqualified finality of the Prophethood of Muhammad (peace be upon Him), the last of the Prophets or claims to be a prophet, in any sense of the word or of any description whatsoever, after Muhammad (peace be upon Him), or recognises such a claimant as a prophet or a religious reformer, is not a Muslim for the purposes of the Constitution or Law.

1977 to 1988:

- Hudood Ordinances in 1979, introduced Islamic criminal law, first time since displaced by colonial rule in favour of English criminal law.

There were five Hudood Ordinances:

- (1) The Offences Against Property (Enforcement of Hudood) Ordinance, 1979 (VI of 1979);
 - (2) The Offences of *Zina* (Enforcement of Hudood) Ordinance, 1979 (VII of 1979);
 - (3) The Offences of *Qazf* (Enforcement of Hudood) Ordinance, 1979 (VIII of 1979);
 - (4) The Prohibition (Enforcement of Hudood) Ordinance, 1979 (IV of 1979);
 - (5) Execution of the Punishment of Whipping Ordinance, 1979 (IX of 1979).
- In 1979, Shariat Benches in High Courts were created.
 - In 1980, Federal Shariat Court was created:
 - o with eight judges, including three religious scholars (*ulema* judges) (Article 203C),
 - o with appellate jurisdiction in Hudood Laws,
 - o to examine under Article 203D, “whether or not any law or provision of a law is repugnant to the injunctions of Islam, as laid down in the holy *Quran* and *Sunnah*”.
 - o either of its own motion or on petition of citizen of Pakistan or Federal or Provincial Government, to examine and decide a question whether or not any law or provision of law is repugnant to the Injunctions of

Islam, as laid down in the Holy Quran and Sunnah of the Holy Prophet, [Article 203D(1)]

According to Article 203DD, FSC is the court of appeal in all cases involving Hudood. Articles 203B-C, exclude certain laws from its power of judicial review, i.e., the Constitution, procedural law, and Muslim personal law.

FSC’s decisions are appealable to Shariat Appellate Bench of Supreme Court, which consists of five members: three Supreme Court judges and two ulema (Art. 203F(3)).

- separate electorates for non-Muslims (1978).
- Zakat and Ushr Ordinance (1980):

Zakat contributes to the concept of social justice and redistribution of wealth, with some features of welfare state. Under Zakat and Ushr Ordinance, 1980, 2.5 per cent tax is imposed on estate of every Muslim, to provide for maintenance for poor and needy. Local zakat committees decide entitlement of recipients.

- Constitution (Eighth) Amendment Act 1985, protected Islamisation measures against judicial review
- Shariat Ordinance 1988

Introduction of *Qisas* and *Diyat* law was a ‘judge-led’ process. In Constitutional Petition, Shariat Bench, Peshawar High Court pronounced that *qisas* (retaliation), *diyat* (blood money) and pardon were the options in murder cases, and Pakistan Penal Code needed amendment. This law was promulgated by Criminal Law (Second Amendment) Ordinance in 1990, and was enacted as Criminal law (Amendment) Act in 1997. Under this law, legal heirs of victim of murder can compromise with offender by either waiving their right of *qisas* or compounding right of *qisas* by

accepting *badal-i-sulh* (consideration for compromise) or blood money.

Following legal codes, introduced by the British, which still form basis of Pakistani criminal law, were amended to some extent in a process of Islamisation:

- Pakistan Penal Code 1860,
- Code of Criminal Procedure 1898, and
- Evidence Act 1872.

Amendments were:

- blasphemy amendments to Pakistan Penal Code (1980, 1982, and 1986),
 - Section 298A, Pakistan Penal Code stipulates that:
 - o Whoever by words, either spoken or written, or by visible representation, or by any imputation, innuendo or insinuation, directly or indirectly, defiles the sacred name of any wife (Ummul Mumineen), or members of the family (Ahle-bait), of the Holy Prophet (peace be upon him), or any of the righteous Caliphs (Khulafa-e-Rashideen) or companions (Sahaaba) of the Holy Prophet (peace be upon him) shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.
- (Inserted by Pakistan Penal Code (Second Amendment) Ordinance, XLIV of 1980)
- Blasphemous words, spoken or written, and visual representations are punishable. (Section 295C of the Pakistan Penal Code (1860), inserted

by the Criminal Law (Amendment) Act, III of 1986,

- Since 1982, imprisonment for life has been stipulated for willful damaging, defaming, abusing, denunciation, and improper use of a copy of the Quran (S. 295B, PPC).
- In 1991, punishment for blasphemy was enhanced to death sentence as a result of a ruling of Federal Shariat Court, which held that alternative punishment of imprisonment for life was contrary to Islam, (Muhammad Ismail Qureshi v. Pakistan PLD 1991 FSC 10)

Appeal against the decision was rejected by Shariat Appellate Bench of Supreme Court in 2009.

- Ahmadiyya-specific amendments in Pakistan Penal Code (1984),
 - Ahmadi face a prison sentence of up to three years when they refer to themselves as Muslims or attempt to propagate their faith (S.298B, PPC).

Same punishment is applicable when they undertake any public act that may 'outrage' the religious beliefs of Muslims in any possible way (S.298C, PPC).

Definition of Muslim was refined in 1985 when following text was added to Article 260(3) (b): '(b) "non-Muslim" means a person who is not a Muslim and includes a person belonging to the Christian, Hindu, Sikh, Buddhist or Parsi community, a person of the Qadiani Group or the Lahori Group (who call themselves "Ahmadis" or by any other name), or a Bahai,

and a person belonging to any of the scheduled castes'. [See section 6 of the Constitution (Third) Amendment Order 1985 as incorporated by section 19 of the Constitution (Eighth) Amendment Act 1985.

- murder and assault (1997),
- Hudood Ordinances (1979):
 - Offences against Property (Enforcement of Hudood) Ordinance 1979,
 - Offence of Zina (Enforcement of Hudood) Ordinance 1979, (substantially amended by Protection of Women Act 2006; rape and fornication are no longer treated as Islamic Hadd crimes, but are governed by the Pakistan Penal Code),
 - Offence of Qazf (Enforcement of Hadd) Ordinance 1979, and
 - Prohibition (Enforcement of Hadd) Order 1979.

1990s and onwards:

In order to bring certain provisions of Criminal Procedure Code in conformity with the Injunctions of Islam as laid down in Holy Quran and Sunnah, Criminal Law (Amendment) Ordinance, 1990 (Ordinance IV of 1990) commonly known as Qisas and Diyat Ordinance was enforced vide Notification No. F 2(2)/90 Pb dated 15.08.1990 by which section 345 of the Code was amended, section 402 was added and column 6 of the Second Schedule relating to offences falling under Ss. 302, 307, 309, 326, 329 and 336 PPC making these offences compoundable, was substituted.

The Criminal Law (Amendment) **Ordinance**, 1990 (Ordinance IV of 1990) i.e., Qisas and Diyat Ordinance continued on the Statute Book through ordinances issued from time to time till enforcement of Criminal Law (Amendment) **Act** II of 1997,

Public Interest Litigation pertains to human rights cases, brought in public interest, not in personal interest. In Pakistan, picking up tempo in 1990s, following India in 1980s, it increasingly drew reference to Islamic law and constitutionally guaranteed fundamental rights.

Under Articles 184 and 199 of the Constitution, respectively, Supreme Court and High Courts have jurisdiction to declare laws and decisions null and void if found to violate fundamental rights, in which these often refer to and 'endorse Islamic principles of justice'. In such cases, in the past, there used to be practice to usually refer to 'principles of natural justice'. Increasing reference to Islam has re-enforced certain fundamental rights, such as 'right of justice' and absolute 'right to be heard'. Such jurisprudence developed by higher judiciary demonstrates harmony between Islamic principles and human rights.

Following remained subject of controversy, drawing lines between traditional community and civil society:

- Attempt to introduce Islamic ombudsman system in North West Frontier Province (KPK) was stopped by Supreme Court, declaring '*Hisba* Bill', 2005, as ultra vires... Reference By the President of Pakistan under Art. 186 of the Constitution of Pakistan. **[PLJ 2006 SC 251]**
- Zina (Hudood) Ordinance 1979 was amended in 2006 by Protection of Women Act.

Some geographical areas are governed by combination of customary and Islamic law, supplemented by Pakistani

statutes extended to these areas. Federally Administered Tribal Areas (FATAs), are governed by constitutional provisions and special laws, such as Frontier Crimes Regulation 1901. Some important national and provincial legislation does not apply there. In 2009, government issued Sharia Nizam-e-Adl Regulation 2009 (SNA), to address agitated issues pertaining to legal system prevailing in Swat:

SNA provides for measures:

- to re-establish existing structures of three tiers of courts, with Qazi courts at trial level, followed by appellate court called Zillah court, and apex court, Dar-ul-Qaza.
- judges of these courts have to be judicial officers of NWFP, who have completed Shariah course from Shariah Academy established under International Islamic University Ordinance 1985 or any other institution imparting training in Uloom-e-Shariah and recognized as such by government (Section 2(e), SNA).
- government can appoint executive magistrates with exclusive jurisdiction over trial of criminal offences under Pakistan Penal Code (1860), carrying punishment up to three years. They can also try for any offence under established principles of Shariah.
- offences not specified in SNA, rest on interpretation of executive magistrate,
- some laws continue to apply to Swat region, but these can be ignored by a judge if in his opinion they are not in accordance with Shariah.
- SNA introduces Islamic law as substantive law for the area, providing in Section 19 (2):

Notwithstanding anything contained in any law for the time being in force all cases [...] shall be decided by the courts concerned in accordance with Sharia'h: provided that cases of non-Muslims in matters of adoption, divorce, dower, inheritance, marriage, usages and wills shall be conducted and decided in accordance with their respective personal laws.

- strict time limits on hearing and disposition of cases as well as encouragement out-of-court settlements.

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